

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BAO YANG,

**Plaintiff,**

CASE NO. C16-1610-RBL-MAT

V.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

Defendant.

**REPORT AND RECOMMENDATION  
RE: SOCIAL SECURITY DISABILITY  
APPEAL**

Plaintiff Bao Yang proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that the matter be REVERSED and REMANDED for further administrative proceedings.

## **FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1966.<sup>1</sup> She moved to the United States from Laos when she

<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 was 18, and received no education in Laos or the United States, with the exception of ESL courses  
2 in the United States. (AR 220.) She previously worked at a chicken processing plant and a sewing  
3 factory. (AR 46-47, 55, 166.)

4 In June 2010 and March 2011, respectively, Plaintiff filed for DIB and SSI, alleging  
5 disability beginning November 17, 2008. (AR 133-41, 149.) Her applications were denied at the  
6 initial level and on reconsideration, and she timely requested a hearing. (AR 91-93, 96-98, 101-  
7 02.)

8 On December 19, 2011, ALJ Larry Kennedy held a hearing, taking testimony from Plaintiff  
9 and a vocational expert (VE). (AR 28-67.) On February 8, 2012, the ALJ issued a decision finding  
10 Plaintiff not disabled. (AR 12-22.)

11 Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on  
12 July 9, 2013 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff  
13 appealed this final decision of the Commissioner to this Court, which reversed the ALJ's decision  
14 and remanded for further proceedings. (AR 664-72.)

15 On remand, the ALJ held a second hearing on February 12, 2015, and took testimony from  
16 Plaintiff and a VE. (AR 599-630.) On June 15, 2015, the ALJ found Plaintiff not disabled. (AR  
17 576-91.) After reviewing additional evidence, the Appeals Council declined to assume jurisdiction  
18 on September 27, 2016. (AR 541-49.) Plaintiff now seeks judicial review, asking the Court to  
19 reverse the ALJ's decision and remand for further proceedings, to allow the ALJ to consider the  
20 evidence that was submitted to the Appeals Council. Dkt. 13 at 1.

21 **JURISDICTION**

22 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

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## **DISCUSSION**

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not performed substantial gainful activity since her alleged onset date. (AR 578-79.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found severe Plaintiff's carpal tunnel syndrome, right shoulder disorder, depression, anxiety, and post-traumatic stress disorder. (AR 579-80.) Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR 580-82.)

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant demonstrated an inability to perform past relevant work. The ALJ found Plaintiff able to perform medium work as defined in 20 C.F.R. §§ 404.1567(c) and 416.967(c), with additional restrictions.<sup>2</sup> She can frequently climb ramps and stairs, but never ladders, ropes, or scaffolds. She can frequently balance, stoop, kneel, and crouch. She can never crawl, but can frequently reach, handle, and finger. She must avoid concentrated exposure to vibration and hazards. The claimant can perform simple, routine tasks and follow short, simple instructions; she can do work that needs little or no judgment; and she can perform simple duties that can be learned on the job in a short period. She can have "occasional" (meaning from time to time or every now and then) interactions of a

<sup>2</sup> The ALJ also entered alternate RFC findings, restricting Plaintiff to light work, with no feeling required, and the remainder of the primary RFC findings, and indicated that there would be jobs that exist in significant numbers that would be consistent with such findings. (AR 591 n.7.)

1 superficial nature with co-workers and supervisors, and can work in proximity to co-workers, but  
2 not in a cooperative or team effort. She requires a work environment that is predictable and with  
3 few work setting changes. She cannot deal with the general public as an essential element of the  
4 work process, but incidental contact of a superficial nature with the general public is not precluded.  
5 (AR 582-83.) With that assessment, the ALJ found Plaintiff unable to perform her past relevant  
6 work. (AR 589.)

7       The ALJ then proceeded to step five of the sequential evaluation, where the burden shifts  
8 to the Commissioner to demonstrate that the claimant retains the capacity to make an adjustment  
9 to work that exists in significant levels in the national economy. With the assistance of a VE, the  
10 ALJ found Plaintiff capable of performing other jobs, such as housekeeper/cleaner, product  
11 assembler, laundry worker, and janitor/clean-up worker. (AR 590-91.)

12       This Court's review of the ALJ's decision is limited to whether the decision is in  
13 accordance with the law and the findings supported by substantial evidence in the record as a  
14 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
15 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
16 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
17 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
18 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
19 2002).

20       Plaintiff argues the ALJ's decision is undermined by evidence submitted for the first time  
21 to the Appeals Council, such that the case must be remanded to allow the ALJ to consider that  
22 evidence. The Commissioner argues the ALJ's decision is supported by substantial evidence and  
23 should be affirmed.

## Appeals Council Evidence

Following the issuance of an ALJ decision finding a claimant not disabled, the claimant may submit “additional evidence that is new, material, and relates to the period on or before the date of the hearing decision” for the Appeals Council to consider in deciding whether to review the case. *See* 20 C.F.R. § 404.970(a)(5). When a court reviews an ALJ’s decision, the court considers both the record before the ALJ as well as additional evidence considered by the Appeals Council, to determine whether the ALJ’s decision is supported by substantial evidence. *See* *Brewes v. Comm’r of Social Sec. Admin.*, 682 F.3d 1157, 1162 (9th Cir. 2012).

In this case, Plaintiff submitted multiple medical opinions to the Appeals Council. (AR 936-59.) The Appeals Council discussed those opinions in its order declining to assume jurisdiction, and found that “none of these opinions changes the weight of the evidence of record” because the opinions are inconsistent with contemporaneous treatment notes and Plaintiff’s activities, and are unsupported by objective evidence. (AR 541-49.)

14 Plaintiff's briefing focuses on some of these opinions, namely opinions rendered by Karl  
15 Weyrauch, M.D., who opined that Plaintiff was limited to sedentary work, in light of her pain in  
16 her right shoulder, arm, hand; neck pain; carpal tunnel syndrome; and neuropathy. (See AR 942-  
17 48, 956-59.) According to Plaintiff, if she is limited to sedentary work, she would be considered  
18 disabled under the Medical-Vocational Guidelines. *See* Dkt. 13 at 6.

19 Dr. Weyrauch's opinions represent a somewhat unique position in the administrative  
20 record, because they are among the few treating source opinions regarding Plaintiff's physical  
21 functioning. The record before the ALJ contained only one such treating source opinion, to which  
22 the ALJ assigned minimal weight, and that treating source did not address all of the conditions that  
23 Dr. Weyrauch mentioned. (AR 587 (referencing AR 528-33).) The scarcity of opinion evidence

1 regarding Plaintiff's physical functioning in the record before the ALJ leads the Court to find that  
2 the RFC assessment is not supported by substantial evidence. The ALJ rejected not only the one  
3 treating source opinion but also the State agency opinions regarding Plaintiff's physical  
4 functioning (AR 587), and did not cite any other evidence describing Plaintiff's physical  
5 functionality. (AR 584-85.) Without any credited opinion evidence or other evidence indicating  
6 Plaintiff's physical functional abilities, the ALJ's RFC assessment appears to lack foundation as  
7 to Plaintiff's physical limitations.

8        Although the Appeals Council explained why it would not fully credit Dr. Weyrauch's  
9 opinions (AR 541-49), and the Commissioner urges the Court to enter similar findings (Dkt. 14 at  
10 3-5), it is the ALJ (not the court) who is responsible for resolving conflicts in the medical record  
11 and resolving ambiguities. *See Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th  
12 Cir. 2014) ("[W]e leave it to the ALJ to determine credibility, resolve conflicts in the testimony,  
13 and resolve ambiguities in the record."). Because the ALJ's decision is not supported by  
14 substantial evidence, the case should be remanded to permit the ALJ to, *inter alia*, review the entire  
15 record.

## **CONCLUSION**

17 For the reasons set forth above, the Court recommends this matter should be REVERSED  
18 and REMANDED for further administrative proceedings.

## **DEADLINE FOR OBJECTIONS**

20 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
21 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and  
22 Recommendation is signed. Failure to file objections within the specified time may affect your  
23 right to appeal. Objections should be noted for consideration on the District Judge's motions

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1 calendar for the third Friday after they are filed. Responses to objections may be filed within  
2 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be  
3 ready for consideration by the District Judge on **July 7, 2017**.

4 DATED this 16th day of June, 2017.

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7 Mary Alice Theiler  
United States Magistrate Judge

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